the lands themselves, and not to heritable securities or real burdens.

The appropriate Schedule E confirms this view, because while it provides for a number of alternative cases, I find in it no words which indicate that one of the subjects to which it was contemplated that a title should be made up under it was a burden on lands, and not the lands themselves. I should have expected that if the 10th section and Schedule E were intended to extend to the completion of title to a heritable security, this would have been expressly stated, or at least that instead of the word "lands" being used, the words "estate in land" would have been inserted, in which case the interpretation of these words might have extended the scope of the provision.

There is no doubt that in virtue of the 9th section of the Act the bond of annuity granted to the petitioner by her late husband is effectual in a question with succeeding heirs of entail, and there are undoubtedly means, though perhaps not so direct as that provided by the 10th section of the Act of 1874 for making her right effectual in competition with other creditors.

I am therefore of opinion that the Sheriff's interlocutor should be affirmed.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Petitioner — Chree. Agents—J. C. Brodie & Sons, W.S.

Friday, June 29.

SECOND DIVISION.

[Sheriff of Roxburgh, Berwick, & Selkirk.

LUPTON & COMPANY *v.* SCHULZE AND COMPANY.

(et e contra.)

Sale—Sale of Moveables—Disconformity to Contract—Rejection—Right to Retain Goods and Claim Damages for Breach of Contract in Extinction of Price—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 11 (*sub-sec.* 2), *and* 53.

Where a buyer of goods intimated rejection of them as disconform to contract, but although requested to do so refused to return them to the seller, and retained them, not for the purpose of accepting and using them as so far in fulfilment of the contract, but for the purpose of putting pressure upon the seller to supply other goods or to acknowledge a claim of damages for breach of contract—*Held*, in an action by the sellers for the contract price—(1) that the buyers, in consequence of the course which they had adopted, were not now entitled to claim damages as for breach of contract in extinction or diminution of the price under the Sale of Goods Act 1893; and (2) that having refused to return the goods they were liable for the full contract price.

The Sale of Goods Act 1893 enacts as follows:—Sec. 11, sub-sec. 2—"In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages."

Sec. 53—(1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may (*a*) set up against the seller the breach of warranty in diminution or extinction of the price, or (*b*) maintain an action against the seller for damages for the breach of warranty. (5) "Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act."

In May 1899 William Schulze & Company, woollen merchants, Galashiels, ordered from William Lupton & Company, woollen manufacturers, Leeds, two pieces of tweed cloth. In response to this order Lupton and Company sent two pieces of cloth with which Schulze & Company were not satisfied, and they were accordingly returned to Lupton & Company to be replaced. Thereafter Schulze & Company ordered another piece of cloth from Lupton & Company. On 21st June Lupton & Company sent to Schulze & Company three pieces of cloth, under numbers 734, 738, and 739 respectively. 734 was sent in fulfilment of the second order, and 738 and 739 were sent in fulfilment of the original order. Schulze & Company accepted 734 as being satisfactory and conform to contract. With regard to 738 and 739 they were not satisfied, and in a letter of date 30th June they stated this to Lupton & Company. On 3rd July Schulze & Company wrote to Lupton & Company that these two pieces were "faulty throughout and totally useless." Lupton & Company replied on 4th July that they could send none more perfect. On 5th July Schulze & Company wrote, "Re-make two good pieces;" and on 6th July Lupton & Company replied that the two pieces sent were as perfect as they could supply. Meantime on 27th June Schulze & Company had ordered two other pieces of cloth, and after some demur, owing to the difficulties which had arisen as to the execution of the previous order, Lupton & Company in fulfilment of this third order on 6th July sent to Schulze & Company two pieces of cloth under numbers 732 and 736. On receipt of these pieces Schulze & Company wrote on 8th July that 736 was "all right," but that 732 was shaded from end to end. In the same letter they wrote, "Re-make 732, 738, and

739 at once, as we must have them right." Thereafter, the following letters passed between the parties:—(1) "*Leeds, 12th July* 1899—Kindly return the pieces you do not think fit to pass when the writer will perch them himself—WM. LUPTON & CO. We understand that you reject three pieces—738 and 739 sent 21st June, and 732 sent 6th July. Is this correct? (2) 14/7/99—Yours of 12th to hand. We will return nothing until we have your distinct promise that you will do your duty to us and attend properly to our orders. 732, 738, and 739 are useless.—WM. SCHULZE & CO. (3) 17/7/99—We note your letter of the 14th. You must either accept or return pieces 732, 738, 739—WM. LUPTON & CO. (4) 18/7/99—We received your letter of 17th inst., which is not an answer to ours of 14th inst. Please give that promise. We decline to put up with unprincipled dealing—WM. SCHULZE & CO. (5) 25/7/99—You have not replied to our letter of 18th inst. We again remind you that we have sold these goods in question; we are under contract, and if you refuse to deliver the goods in a right and proper way, you compel us to claim damages, which will be very heavy. We will not allow ourselves to be played with, though we will show you all the consideration possible—WM. SCHULZE & CO. (6) 2/8/99—We confirm our letters of 18th and 25th ulto., and warn you once more to do your duty to us and deliver now what you have undertaken in a proper and business-like manner. Failing your doing so we shall certainly hold you responsible. We have shown you every possible leniency, and more we cannot do—WM. SCHULZE & CO. (7) 3/8/99—In reply to your letter of yesterday, we beg to refer you to our letter of 17th July—WM. LUPTON & CO. (8) 7/8/99—Rather than give these absurd answers, you should make yourselves familiar with the law and your duty under it. You have agreed to deliver goods, and you have refused to comply with your contract. That you deliver faulty useless goods does not fill the contract. You conduct yourselves in a most unreasonable manner. We will hold you answerable for all loss that results from your acting; we have done enough to warn you, and have shown more consideration than you have a right to claim or expect—WM. SCHULZE & CO. (9) 8/8/99—We have your letter of the 7th inst., and have nothing to add to our previous letters—WM. LUPTON & CO. (10) 16/8/99—What we lose by the non-delivery of the three pieces is £16, 19s. 11d. We will return the three totally defective pieces as soon as you acknowledge our claim, for we do not owe you as much for the two pieces you delivered correctly, and we have to keep ourselves safe so far as we can. For these two pieces we owe you £11, 0s. 8d.—for this you have credit—WM. SCHULZE & CO."

Schulze & Company did not return any of these pieces of cloth.

Lupton & Company raised an action against Schulze & Company concluding for £31, 3s. 5d., being the price of the cloth in dispute, and of the other pieces regarding which the parties were not at issue. The defenders admitted liability for £11, 11s. 5d., but stated a counter claim of £37, 16s. 5d., the amount of the damages which they alleged they had sustained in consequence of the pursuers' breach of contract.

The pursuers pleaded, *inter alia*—"(3) The defenders' counter claim should be repelled, in respect (*a*) that the goods were not furnished under any contract. (4) The defenders are barred from claiming damages proceeding on retention of the goods, in respect that they elected to take the remedy of rejection."

The defenders pleaded, *inter alia*—"(2) The pursuers having furnished to the defenders goods of a faulty and inferior description from those contracted for, and disconform to pattern and sample, and having failed to perform a material part of their contract with the defenders, the defenders are entitled to retain the said goods, and to claim damages for breach of contract. (3) The pursuers having failed to perform a material part of their contract as aforesaid, the defenders are entitled to set up their claim for damages for breach of contract against the sellers in diminution or extinction of the price of the goods sued for."

Thereafter Schulze & Company raised a counteraction against Lupton & Company, concluding for the sum of £37, 16s. 5d. above-mentioned, in name of damages for breach of contract.

On 26th January 1900 the Sheriff-Substitute (SMITH) repelled plea 3 (*a*) and plea 4 stated for the pursuers in the principal action, and before further answer allowed a proof.

Lupton & Company appealed to the Sheriff (VARY CAMPBELL).

A joint-minute of admissions was lodged, and further probation was renounced by the parties.

The nature of the facts admitted, so far as material, sufficiently appears from the foregoing narrative and the interlocutor of the Sheriff, *infra*.

On 2nd March 1900 the Sheriff issued the following interlocutor:—"The Sheriff having considered the cause along with the minute of admissions now lodged, Sustains the appeal, and recals the interlocutor of the Sheriff-Substitute dated 26th January last: Finds that the pursuers William Lupton & Company, manufacturers in Leeds, as sellers, on or about 21st June 1899 sent three pieces of cloth under the numbers 734, 738, 739, and on or about 6th July 1899 sent two pieces of cloth under the numbers 732, 736, all five pieces to the defenders William Schulze & Company, merchants in Galashiels, as buyers: Finds that the defenders after examination accepted two of these pieces under the numbers 734, 736, and have not yet paid, and are now liable for the full prices thereof: Finds that the defenders, after examination, rejected and refused to accept and pay for the three pieces under the numbers 732, 738, 739, and at the same time refused to let the sellers have the goods back to be dealt with by them as owners, and held and retained the goods without any consent or authority

from the sellers or other lawful authority, as in pledge or security that the sellers should deliver other goods to the defenders in lieu of the goods sent, or pay damages to the defenders: Finds in law that the defenders as buyers took up a wrong position in so holding and detaining the goods, and that they must pay the full prices of the three pieces under the numbers 732, 738, 739, and are barred from any counter-claim for damages: Therefore finds the said pursuers' account for the prices of the five pieces with other relative items to be correctly stated, and decerns in terms of the prayer of the petition in the action at the instance of William Lupton & Company: Further, in the counter-action at the instance of William Schulze & Company, assoilzies the defenders: Finds William Lupton & Company entitled to their expenses of process in both actions," &c.

Schulze & Company appealed to the Court of Session, and argued—The Sheriff had erred in holding that the appellants had definitely rejected the goods. Their letter of 14th July showed that they refused to declare their election. A purchaser was under no obligation to declare his election unless he rejected the goods. Failure to give notice might no doubt infer *mora* or personal bar, but was not a condition-precedent to a claim for compensation — *Fielder* v. *Starkin*, 1788, H. Blackstone's Rep. i. 17; Sale of Goods Act, sec. 59. But even if it were held that the appellants had definitely rejected the goods, it was still competent for them to claim damages in respect of the sellers' failure to perform a material part of the contract—Sale of Goods Act, sec. 11 (2); *Electric Construction Co.* v. *Hurry and Young*, January 14, 1897, 24 R. 312, *per* Lord Kinnear. The Sale of Goods Act gave an alternative remedy to the buyer which was not open to him under the common law—*Padgett* v. *M'Nair*, Nov. 24, 1852, 15 D. 76.

Argued for Lupton & Company—The Sheriff's judgment was right. It was clear from the correspondence, particularly the letters of 12th, 14th, and 17th July, that the appellants had definitely rejected the goods. In spite of that rejection they retained them, not for use, but for the purpose of coercing the respondents to admit their claim of damages. That was not competent, either at common law or under the Sale of Goods Act. A buyer was not entitled to refuse to declare his election. He was bound either to accept and pay for the goods (section 27), or "within a reasonable time after delivery" to reject or retain them, and claim compensation—sections 11 (2), 53. Here the appellants had intimated rejection, and yet by retaining the goods had prevented the respondents from making use of them.

At advising—

LORD JUSTICE-CLERK—Having carefully considered the correspondence in this case, the conclusion I arrive at is the same as that contained in the Sheriff's interlocutor. The pieces of cloth to which the dispute relates were declared by the defenders to be "totally useless," whereupon the pursuers by return of post intimated that they could send nothing better. To that the defenders replied asking them to "re-make two good pieces," and that order was repeated a few days later, to which the pursuers replied that it appeared to them "useless" to attempt to supply the defenders. The pursuers then asked that the pieces be returned to them, and in reply the defenders refused to return anything, but again declared the pieces complained of to be useless. To bring matters to a point, the pursuers wrote saying "you must either accept or return," and the defenders only reply was, "We decline to put up with unprincipled dealing"—an expression which there was nothing in the proceedings to justify. This was followed up by letters insisting on fulfilment of the contract by delivery of other pieces, and in one of the later ones the expression is used, "You have refused to comply with your contract; that you deliver faulty useless goods does not fill the contract." The pursuers adhered to the position they had taken up, and wrote—"We cannot admit your right to retain the three pieces as you have done and refuse to pay for them." And there the correspondence ended. I have no doubt in holding that the defenders rejected the goods, and called upon the pursuers to supply others under the contract. But while rejecting the goods they refused to return them, although repeatedly asked to do so, thus making it impossible for the sellers to make the most they could of these goods for their own interest, seeing that they were being challenged for failure to fulfil the contract. The defenders still hold these goods, and the pursuers have not been able to get either the price or the goods. In these circumstances I am of opinion that the defenders' position is quite untenable, and that retaining the goods notwithstanding their emphatic rejection of them, they must pay for them and cannot take any benefit from the Sale of Goods Act. They did not take up the position open to them under the Act, but refused to accept the goods as a fulfilment of the contract at all. By their own actings they have placed themselves in the position of refusing to accept the goods as in fulfilment of the contract and at the same time making it impossible for the pursuers to deal with them as their property. In these circumstances I think they have been rightly held liable to pay the price.

LORD TRAYNER—I think the Sheriff has reached a sound conclusion in this case. The appellants ordered and received from the respondents the goods, the price of which is here in question. Being dissatisfied with the goods (I do not inquire whether they were so with good reason), the appellants declined to receive them as in fulfilment of their order. In these circumstances the appellants had open to them an alternative course. They could reject the goods and place them at the disposal of the

respondents, or they could keep the goods at the contract price and claim damages on the ground that the sellers had failed to perform a material part of their contract. Between these alternatives the appellants had to choose; they could adopt either, but they must adopt one of them, and once their election was made and intimated, that election was final in the sense that the position and consequent rights of parties were thereby fixed. The appellants elected to reject and did reject the goods in question. That in my opinion is proved. I do not go over the proof upon the subject, but have no doubt it clearly establishes rejection. That being so, the appellants had no right to retain the rejected goods. They might have had a claim for damages on the ground of breach of contract, but they had not the right to retain the goods and claim damages as for partial non-fulfilment such as now is competent to a buyer under the Sale of Goods Act. But the rejected goods were retained by the appellants, which prevented the respondents (the sellers) from making use of them, and they so retained them after repeated demands on the part of the respondents that they should be returned. In these circumstances I think the Sheriff has rightly held that the appellants are liable for the price of the goods so improperly retained.

LORD MONCREIFF—I am clearly of opinion that the Sheriff is right. In the correspondence which preceded the raising of these actions the defenders Schulze & Company adopted a position which was not warranted either by the common law or by the Sale of Goods Act 1893. In the view which I take of the correspondence they absolutely rejected the three pieces of cloth, numbered 732, 738, and 739, as being disconform to contract and useless, but at the same time although requested to do so refused to return them to the pursuers Lupton & Company, and retained them, not for the purpose of *pro tanto* satisfying the contract, but in order to put pressure on Lupton & Company to acknowledge their claim for damages.

Although Schulze & Company do not in terms state that they reject the goods, it can be demonstrated upon the letters that this is what they did.

Now, under the law as it stood before the passing of the Sale of Goods Act 1893, it is certain that Schulze & Company's contention was not maintainable. This was decided in terms in the case of *Padgett* v. *M'Nair*, 15 D. 76, which is precisely in point. Stated shortly it was decided there that if the purchaser intended to reject the goods he was bound to return them, that he was not entitled to retain them otherwise than as a purchaser, and that having retained them he was liable in the contract price.

This being the undoubted law before the passing of the Sale of Goods Act 1893, the next question is, does the statute alter the previously existing law in this respect? As I read section 11 (2) the only alteration introduced by the statute is, that where goods are to a material extent disconform to contract the purchaser is not confined to the two courses of either rejecting the goods or retaining them and paying the full contract price. A third course is open to him, viz.—to retain the goods, that is to accept them as so far in fulfilment of the contract, and to treat the failure to perform a material part of the contract as a breach which may give rise to a claim for compensation or damages. But if the purchaser avails himself of this new remedy, which was not open to him under the older law, he must elect to retain the goods for the purpose of accepting and using them.

Now, in the present case Schulze & Company rejected the goods out and out, and though they retained them it was not for the purpose of using them under the contract. I am therefore of opinion that the statute does not affect the rights of parties in this case.

The only other question to be considered is, whether, assuming that Schulze & Company at first rejected the pieces of cloth in question, they are now entitled to retain the goods in the sense of keeping and using them under their contract and to claim damages for breach of warranty. On this question the case of *The Electric Construction Company* v. *Hurry & Young*, 24 R. 312, was cited to us on the part of the pursuers. This is a much stronger case, because while there the sellers refused to take back the machine when it was rejected by the purchaser, here the pursuers called upon the defenders to return the goods which they had rejected; but the latter, while they declined to use the goods, retained them as a security or for the purpose of putting pressure upon the pursuers.

There may perhaps be exceptional cases in which, after a purchaser has rejected goods as not being conform to contract, he may be entitled to retain and use them, claiming damages in respect of defects in quality. As to such cases I reserve my opinion. But as a general rule I think that when a purchaser makes his election under section 11, sub-section (2), of the Sale of Goods Act 1893, he is bound in fairness to the seller to do so, not only within a reasonable time, but once for all; and that if the election be to reject the goods and it has once been made deliberately and intimated to the seller, the purchaser cannot, after an interval (especially, as here, if he has retained the goods not for use but by way of security) betake himself to the alternative remedy of keeping the goods and claiming damages.

I think that we should be straining the statute unduly if we acceded to this proposal.

The result, therefore, is that Schulze & Company having retained the pieces of cloth, not under section 11 (2) of the statute, but for the illegitimate purpose of putting pressure upon the pursuers, must be treated as they would have been treated under the older law as having accepted the goods unconditionally. They are therefore

liable to Lupton & Company in the contract price.

LORD YOUNG was absent.

The Court dismissed the appeal in the conjoined actions, found in fact and in law in terms of the interlocutor appealed against, and of new decerned in terms of the said interlocutor.

Counsel for the Appellants—W. Campbell, Q.C. — M'Lennan. Agent — George Matthewson, S.S.C.

Counsel for the Respondents—Solicitor-General (Dickson, Q.C.)—Constable—Constable & Johnstone, W.S.

Saturday, June 30.

SECOND DIVISION.

[Sheriff of Forfarshire.

TAGGART *v.* HIGGINS' EXECUTOR.

Donation—Donation mortis causa—Entry of Name in Saving's Bank Pass-Book—Proof of Intention to Make Gift of Amount in Pass-Book—Delivery.

On 27th July 1896 A, a millworker, having a credit account for about £50 with a savings bank, got her sister B's name added to her own in the bank pass-book, and her account thereafter was kept in the name of herself and B, "to be repaid to either of them." Under the bank's rules B could have drawn money from the account, but she never did so. A was a weekly visitor at the bank, either putting in or drawing out money. The bank book was in A's possession when she died on 11th February 1899.

An action was raised at the instance of B to have it declared that the money payable by virtue of the bank pass-book had been validly donated *mortis causa* to her by A, and a proof was led from which it appeared that A had stated to certain witnesses that she had added the pursuer's name to her own in the bank-book because she intended her to get the money after her death, but had stated to certain other witnesses that she intended her brother to get a share of the money. *Held* that the pursuer had failed to establish a *mortis causa* donation by A to B of the sum contained in the pass-book.

In April 1899 Mrs Margaret Higgins or Taggart, wife of Moses Taggart, Dundee, with consent and concurrence of her husband as her curator and administrator-at-law, raised an action in the Sheriff Court at Dundee against John Cochrane, weaver, Dundee, executor-dative of the deceased Margaret Higgins, millworker there. The pursuer prayed the Court "to find and declare that the sum of £50, being the principal sum payable by the Dundee Savings Bank, under and in virtue of the bank pass-book No. 6485, in name of the deceased Margaret Higgins and pursuer, with interest accrued thereon, was validly donated *mortis causa* to pursuer by the deceased Margaret Higgins; to find that the defender as executor aforesaid is not entitled to obtain payment of said sum or to interfere with or prevent pursuer obtaining payment of the principal sum and interest as aforesaid, and to interdict him accordingly."

A proof led before the Sheriff-Substitute (SMITH) disclosed the following facts:—Margaret Higgins, a sister of the pursuer, died on 11th February 1899, aged seventy. She had an account with the Dundee Savings Bank from February 1876. On 27th July 1896, about which time she came out of the infirmary after undergoing an operation, she got the pursuer's name added to her own in the bank pass-book, and her account thereafter was kept in the name of herself and the pursuer, "to be repaid to either of them." From that date till the death of Margaret Higgins' the account stood in the two names, and the amount at its credit was always between £56 and £50. Under the bank's rules if the pursuer had come to draw money from the account it would have been paid to her, but for sums of £3 and upwards she would have required to sign her name before she got the money. The pursuer had never drawn money from the account. Margaret Higgins herself was practically a weekly visitor to the bank, either putting in or lifting money. The bank book was in the possession of Margaret Higgins at her death. She had a habit of talking to her relations and neighbours about her money, and a considerable amount of evidence was led as to what she said on the subject during the last three years of her life. The pursuer deponed that in 1896 Margaret Higgins "requested me to go down to the Savings Bank to get my name put into her bank account, as she wanted me to get the money;" that after the name was added, Margaret Higgins had said to her "that she wished me to give her a respectable funeral, and that I could keep the balance of the money in the bank to myself," and that Margaret Higgins "left the bank book repeatedly with me." Four other witnesses for the pursuer deponed that Margaret Higgins had declared to them that she had added the pursuer's name to her own in the bank book because she wanted the pursuer to get the money after her death, and that she intended that the pursuer should get it. One of these witnesses, however, also deponed that she had heard Margaret Higgins say that she might live to use the whole of the money herself. For the defender, James Higgins, a brother of Margaret, gave evidence that she had told him that the pursuer's name was put into the bank book in order that she might be able to go to the bank and draw whatever money Margaret Higgins wanted when the latter was unwell, and five other witnesses deponed that Margaret Higgins had declared to them that her brother James Higgins would get a share of her money when she died.